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IN THE

Supreme Court of the United States

MATT O'DEA, PETITIONER

v.

BNSF RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should federal district courts provide deferential on-the-record review of State agency decisions when the only basis for federal jurisdiction upon removal is the parties' diversity of citizenship?

2. Is a cross-jurisdictional appeal removed to federal district court seeking deferential on-the-record review of a State agency decision a "civil action" authorized by federal law or a "case or controversy" within Article III?

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The published opinion of the Court of Appeals for the Ninth Circuit in *BNSF Railway Company, a Delaware corporation v. Matt O'Dea* (C.A. No. 08-35075), reported at 572 F.3d 785(9th Cir.2009), decided and filed July 16, 2009, reversing the Order of the U.S. Magistrate for the District Court dismissing respondent's removed action for lack of subject matter jurisdiction, is set forth in the Appendix hereto(App. 1-17).

The unpublished Order of the U.S. Magistrate for United States District Court for the District of Montana, Billings Division, in *BNSF Railway Company, a Delaware corporation v. Matt O'Dea* (Civil Action No. CV-07-137-BLG-CSO) and *Matt O'Dea v. BNSF Railway Company, a Delaware corporation*(Civil Action No. CV-07-141-BLG-CSO), dated and filed January 4, 2008, consolidating these two cases and then dismissing Civil Action No. CV-07-137-BLG-CSO for lack of subject matter jurisdiction and remanding Civil Action No. CV-07-141-BLG-CSO to state court, is set forth in the Appendix hereto(App. 18-32).

The unpublished order of the Court of Appeals for the Ninth Circuit in *BNSF Railway Company, a Delaware corporation v. Matt O'Dea* (C.A. No. 08-35075), decided August 21, 2009, denying the petitioner's timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 33).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit reversing the Order of the U.S. Magistrate for the District Court dismissing respondent's removed action for lack of subject matter jurisdiction was entered on July 16, 2009; and its Order denying the petitioner's timely filed petition for rehearing *en banc* was filed on August 21, 2009(App. 1;33).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the laws of the United States...; [and] to Controversies...between Citizens of different States....

28 U.S.C. Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United

States.

28 U.S.C. § 1332(a)(1):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
> (1) citizens of different States....

28 U.S.C. § 1441(a):

> (a) Except as otherwise expressly provided by Congress, any civil action brought in a State court which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1367(a):

> Except as [otherwise] provided...by Federal statute, in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

Montana Code Annotated § 2-4-702(a):

> ...[A] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter. This chapter does not limit the use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute.

Montana Code Annotated § 2-4-704(1) and (2):

> **Standards of review.**
> (1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown on the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant been prejudiced because:
> (a) the administrative findings, inferences, conclusions, or decisions are:
> (i) in violation of constitutional or statutory provisions;
> (ii) in excess of the statutory authority of the agency;
> (iii) made upon unlawful procedure;

(iv) affected by other error of law;
(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(b) findings of fact, upon issues essential to the decision, were not made although requested....

STATEMENT

In March of 2004, petitioner Matt O'Dea ("petitioner") sought employment with respondent Burlington Northern and Sante Fe Railway Company, a Delaware corporation("BNSF" or "respondent"), by applying electronically to BNSF for a Conductor Trainee position located in Havre, Montana. On April 5, 2004, BNSF's hiring personnel interviewed petitioner and other employee candidates in Havre.

Eleven days later, on April 16, 2004, respondent's Human Resource Manager Larry Martin extended to petitioner a conditional offer of employment with BNSF, contingent on proof of permanent eligibility in the United States, receipt and review of a completed BNSF medical history questionnaire and successful completion of a drug screen, physical examination and an Industrial Physical Capability Services (IPCS) exam(App. 2). Petitioner timely completed and submitted BNSF's medical questionnaire and on April 21, 2004, petitioner passed respondent's IPCS examination, indicating that he was recommended for the train service job he sought with BNSF. On April 27, 2004, BNSF's physician examined

petitioner and concluded that he could work as a BNSF conductor without restrictions.

On May 11, 2004, Dr. Ronald Peterson, a physician with a specialty in occupational and sports medicine, examined petitioner in Great Falls, Montana. He concluded that petitioner's physical condition and health----petitioner's Body Mass Index (BMI) classified him as having extreme obesity----did *not* make it unsafe or dangerous for him to perform the job of conductor-brakeman for which he applied with BNSF.

However, respondent reviewed petitioner's medical information and concluded that he was not medically qualified to work in train service as a conductor or as an engineer. On May 19, 2004, BNSF sent petitioner an Examinee Health Report indicating that he was medically disqualified from the Conductor position due only to his obesity.

On September 1, 2004, petitioner filed a charge of discrimination against respondent before the Montana Department of Labor and Industry alleging that BNSF discriminated against him on the basis of a perceived disability (obesity) when it disqualified him for a training position as a Conductor Trainee on May 19, 2004, in violation of the Montana Humans Rights Act(App. 2). On August 14, 2006, a Hearing Examiner for Montana's Department of Labor and Industry granted petitioner's motion for summary ruling on liability, ruling that respondent illegally discriminated against petitioner because of a condition it regarded as a disability (extreme obesity) by withdrawing its prior conditional offer of employment to petitioner without first undertaking an individualized assessment of the

risk of substantial harm to petitioner or others due to his physical condition, rejecting him for employment as a Conductor Trainee(*Id.*).

On May 15, 2007, the Montana Department of Labor and Industry issued a Final Agency Decision to the same effect, awarding petitioner damages for front pay, back pay and emotional distress(*Id.*). BNSF appealed this decision of Montana's Department of Labor and Industry to the Human Rights Commission and petitioner filed a cross appeal. The Human Rights Commission affirmed the decision of the Montana Department of Labor and Industry on September 7, 2007(*Id.*).

On October 3, 2007, respondent filed a so-called "complaint" in the federal district court for the District of Montana, Billings Division, alleging diversity of citizenship and seeking review of the agency's decision against it(*BNSF Railway Company, a Delaware corporation v. Matt O'Dea* (Civil Action No. CV-07-137-BLG-CSO)(*App.* 2;18). One day later, on October 4, 2007, respondent filed a petition for review in the Montana Thirteenth Judicial District of Yellowstone County, seeking review of the agency's final order; and on October 17, 2007, it removed this State court action to the federal district court for the District of Montana, Billings Division(*Matt O'Dea v. BNSF Railway Company, a Delaware corporation* (Civil Action No. CV-07-141-BLG-CSO).

Two weeks later, on October 18, 2007, petitioner filed his own petition for review of the agency's decision in the State of Montana's First Judicial District of Lewis and Clark County, the proper venue for a review

of the decision of the Human Rights Commission, seeking review of the agency's damage award as well as an award of his attorney's fees. BNSF then removed this action from State court to the federal district court in Helena on November 13, 2007. *Matt O'Dea v. BNSF Railway Company, a Delaware corporation et al.*(Civil Action No. CV-07-69-H-CCL).

With these three concurrent actions now pending in federal district court, petitioner moved to dismiss Civil Action No. CV-07-137-BLG-CSO and to remand Civil Actions No. CV-07-141-BLG-CSO and CV-07-69-H-CCL to the State courts of Montana(App. 2-3). On January 4, 2008, the U.S. Magistrate Judge, Carolyn S. Otsby, entered an Order consolidating Civil Actions No. CV-07-137-BLG-CSO and CV-07-141-BLG-CSO for purposes of petitioner's pending motions; she then dismissed Civil Action No. CV-07-137-BLG-CSO for lack of subject matter jurisdiction and remanding to State court Civil Action No. CV-07-141-BLG-CSO(App. 18-32).

Petitioner had argued *inter alia* that both Civil Actions No. CV-07-137-BLG-CSO and CV-07-141-BLG-CSO were "in the nature of an appeal from a state agency's decision and the Ninth Circuit has determined [in *Shamrock Motors, Inc. v. Ford Motor Co.*, 120 F.3d 196(9th Cir. 1997)] that federal courts sitting in diversity lack jurisdiction over such actions"(App. 23-25). Respondent replied by arguing that the Supreme Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S.156(1997) overruled *Shamrock* and left federal district courts free to conduct on-the-record review of State administrative rulings even though diversity of citizenship is the only

jurisdictional peg(App. 25-26).

The Magistrate agreed with petitioner(App. 26-30). She reasoned that the Court's decision in *College of Surgeons* addressed the issue of whether a lawsuit filed in State court seeking review of a non-federal administrative agency action could only be removed to federal district court *where the case contained both federal question claims and State administrative challenges to the agency's decisions*(App. 27-28). Thus the *College of Surgeons* Court would permit removal to federal district court only of a lawsuit containing claims "failing within the federal court's supplemental jurisdiction where removal was based on a federal question"(App. 27).

Moreover, the Magistrate observed that the Court in *College of Surgeons* expressly left open the question of whether removal would have been proper had only the federal court's diversity jurisdiction been invoked(*Id.*). She cited *College of Surgeons*, 522 U.S. at 172, where the Court refused to answer the question whether State law claims for on-the -record review of a local agency decision, "if brought alone would substantiate the district courts' 'original' jurisdiction over diversity cases under § 1332"(*Id.*). Nor did the Magistrate believe any of the other cases cited by respondent in support of removal was apposite as in every one of those cases a federal question was present to anchor the district court's original jurisdiction(App. 27-29).

Concluding that *Shamrock* was still good law in the Ninth Circuit, Magistrate Otsby therefore dismissed Civil Action No. CV-07-137-BLG-CSO and

remanded Civil Action No. CV-07-141-BLG-CSO to the Montana Thirteenth Judicial District Court, Yellowstone County, for further proceedings(App. 30).

In the aftermath of the Magistrate's decision, the third case (*Matt O'Dea v. BNSF Railway Company, a Delaware corporation et al.* (Civil Action No. CV-07-69-H-CCL) was remanded to the Montana State courts in Lewis and Clark County by District Judge Charles Lovell in Helena on May 14, 2008. He concluded *inter alia* that federal district courts lack subject matter jurisdiction over on-the-record appeals from State agency decisions.

BNSF appealed to the Ninth Circuit court of appeals only Magistrate Otsby's decision dismissing Civil Action No. CV-07-137-BLG-CSO(App. 1-2). As far as the remanded action (Civil Action No. CV-07-141-BLG-CSO) was concerned, petitioner and BNSF agreed to transfer venue of that case to Lewis and Clark County where petitioner's action (Civil Action No. CV-07-69-H-CCL) had been remanded by District Judge Lovell.

Eventually, Montana's First Judicial District of Lewis and Clark County affirmed the decision of the Human Rights Commission in petitioner's favor and denied BNSF's attempt to prevent enforcement of the decision. Respondent appealed this decision and the Montana Supreme Court has recently affirmed the ruling of the First Judicial District of Lewis and Clark County determining that petitioner "prevailed on the merits in the judicial review" and "is entitled to enforcement of his judicially-confirmed award of damages." *Mont. Dept. of Labor & Indus. v. BNSF Ry.*,

2009 MT 262N, Paragraphs 6-9, 2009 Mont. LEXIS 394(August 5, 2009).

In the meantime, the court of appeals heard BNSF's appeal from the Magistrate's dismissal of its diversity action seeking review of the State agency's decision, issuing its opinion on July 16, 2009 (App. 1-17). Speaking through Fernandez, J., the court of appeals determined that under Montana's administrative procedure, review of the decision of the Human Rights Commission in petitioner's favor is on-the-record rather than *de novo*; it is purely appellate in nature where the reviewing court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact and if it believes more evidence is necessary, it must remand the matter to the agency for that purpose(App. 2-3;6-7).

The court of appeals reasoned that under this State administrative regime, there would have been no jurisdiction in the federal district courts to hear this appeal by BNSF because under *Shamrock*, decided by the court of appeals in 1997, "[w]hen a state provides for administrative agency review of an appellate nature, rather than administrative review of a *de novo* nature, federal district courts have neither original jurisdiction nor removal jurisdiction over the review proceedings"(App. 7 citing *Shamrock*, 120 F.3d at 200). In reaching this result, the *Shamrock* court relied upon both *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574(1954) and *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348(1961).

However, the court of appeals noted that since *Shamrock* was decided, the Supreme Court rendered

its decision in *City of Chicago v. International College of Surgeons*, 522 U.S.156(1997) (App. 7-8). There a majority of the Court observed that nothing in that case turned on whether review of State administrative decisions was on-the-record or *de novo* since federal courts routinely perform this kind of deferential review with federal administrative agencies; and "nothing in § 1367(a) suggests that district courts are without supplemental jurisdiction over claims seeking precisely the same brand of review of local administrative determinations"(App. 8 citing *id.* at 171).

The *City of Chicago* case, however, implicated several *federal* questions within the meaning of § 1332 together with supplemental state law claims within the meaning of §1367(a) seeking review of the State agency's decision. Moreover, the majority in *City of Chicago* made clear that it was *not* deciding whether these same state claims for on-the-record review of a local agency's decisions, if brought alone by citizens of diverse citizenship, would substantiate the district courts' "original" jurisdiction over diversity cases under §1332(App. 8 citing *City of Chicago*, 522 U.S. at 172.).

Nonetheless, the court of appeals saw no principled distinction between federal and diversity jurisdiction for purposes of determining the district courts' supplemental jurisdiction to consider on-the-record review of purely local state administrative proceedings under §1367(a)(App. 8-9). It therefore concluded that although the *City of Chicago* Court did not decide the identical issue in *Shamrock*—or expressly overrule it—its language had so thoroughly undermined *Shamrock* that it was constrained to rule

that "even though this case involves on-the-record review of a Montana administrative agency decision, the district court has diversity jurisdiction"(App. 9-10).

Fisher, J., concurred separately(App. 12-17). He believed *Shamrock's* holding that district courts lack original jurisdiction over cross-system, on-the-record appeals from State agency decisions was driven principally by *Shamrock's* legitimate concern that federal district courts not become administrative appellate tribunals superintending all manner of actions by county and municipal agencies, boards and commissions, "a rather jarring [prospect which] should not be quickly embraced as a matter of policy"(App. 13-15). He reasoned that *Shamrock* rested less on any distinction between on-the-record and *de novo* review and more on a compelling principle of federalism, i.e., not foisting upon already overburdened federal courts the duty to oversee myriad decisions by state and local authorities from contractors' licenses to building permits(App. 12;14-15).

Moreover, Judge Fisher saw in the *City of Chicago* decision a reaffirmation by the Supreme Court of these same principles of federalism which fueled *Shamrock's* result, making colorable petitioner's argument that *Shamrock's* holding with respect to *diversity jurisdiction* survives *City of Chicago*(App. 13-15). First, in the face of Justice Ginsburg's dissent identifying *Shamrock's* policy concerns and suggesting that the majority's analysis would be no different with diversity jurisdiction, the majority validated these concerns about federalism by repeatedly and explicitly limiting its holding to the *supplemental jurisdiction* presented in that case; and it expressly left open the

question whether these same State claims, standing alone without a federal question jurisdictional peg, would substantiate the district courts' original jurisdiction under the diversity statute(App. 15).

Second, while *City of Chicago* rejected the distinction between *de novo* and on-the-record review in ruling as it did, neither did *Shamrock* rely exclusively on this distinction in reaching its result(App. 14). Third, the *City of Chicago* Court encouraged district courts to consider the Court's abstention doctrines when presented with these cross-system appeals(App. 16).

For all these reasons, Circuit Judge Fisher concluded that this was "a close case" whether *Shamrock's* holding----and the policy reasons rooted in federalism which support its result—survive *City of Chicago*(App. 14-16). All of this suggested to him that lower federal courts might properly find that diversity cases *are* different and that

> [t]here are good reasons that diversity cases *should* be different, the most obvious of which is the expansion of federal court authority foretold by [Justice Ginsburg's] *City of Chicago* dissent.

(App. 15-16)(emphasis in original). He urged the district court on remand to consider whether any abstention principles apply together with relevant principles of *res judicata* should the concurrent State proceedings become final(App. 16-17).

On August 21, 2009, the court of appeals denied petitioner's timely filed petition for rehearing *en*

banc(App. 33).

REASONS FOR GRANTING THE PETITION

1. The Ruling Below Which Allows Federal District Courts To Conduct On-The-Record Review of State Administrative Decisions When There Is Only Diversity of Citizenship And No Federal Question Presented Conflicts With The Decisions Of This Court.

The issue presented by this petition is whether federal district courts may, indeed must, entertain cross-system, deferential, on-the-record appeals from local agency decisions without regard to the presence or absence of any federal question whenever the parties meet the diversity of citizenship requirements of § 1332. The decisions of this Court, still good law and having never been overruled, persuasively answer this question in negative.

The ruling below reaches the opposite conclusion by unduly cramping this Court's earlier decisions in *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574(1954) and *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348(1961), while irrationally expanding the sweep of the Court's later decision in *City of Chicago v. International College of Surgeons*, 522 U.S.156 (1997) to encompass facts which the Court never addressed. The result wrongly federalizes without Congress' explicit authority garden variety appeals by parties from purely local administrative decisions absent any federal question to justify Article III jurisdiction, dramatically increasing the business of already overburdened federal district courts and undermining sound notions

of federalism and comity.

The analysis begins with *Stude*. There a railway company pursued condemnation proceedings against the landowner in Iowa administrative proceedings but was unsatisfied with an award which it believed gave him too much. 346 U.S. at 577. Iowa law provided that an appeal from this award be made to the State district court to be tried there "as in an action by ordinary proceedings."*Id.* at 576. Instead, the railway began a civil action in the federal district court against the landowner alleging diversity of citizenship and seeking lesser damages than awarded by the Iowa administrative commission. *Id.* at 577. Meanwhile, the landowner pursued his own appeal from the award in State district court pursuant to Iowa law. *Id.*

The railway removed the landowner's State appeal to federal court and, once there, the landowner sought the dismissal of the railway's federal action and the remand of his own back to State court. *Id.* The district judge dismissed the railway's action and the court of appeals affirmed while ordering the lower court to remand the landowner's removed action back to the Iowa state courts. *Id.* at 577-578.

The *Stude* Court affirmed the dismissal of the railway's federal action. *Id.* at 580-581. It reasoned that the railway's complaint in federal district court sought review of the commission's assessment of damages and could not be understood any other way. *Id.* at 580. As such, the Court found that "it was an attempt of the [railway] to review the state proceedings on appeal to the Federal District Court." *Id.* at 581. As the Court concluded, the railway could not perfect its appeal to

any other court except that one which Iowa statutes directed which was the Iowa district court. *Id.* It held that the federal district was without jurisdiction to consider such an appeal taken administratively or judicially in a state proceeding. *Id.* The *Stude* Court wrote :

> the United States District Court for the Southern District of Iowa does not sit to review on appeal action taken administratively or judicially in a State proceeding. A state "legislature may not make a federal district court, a court of original jurisdiction into an appellate tribunal or otherwise expand its jurisdiction...." *Burford v. Sun Oil Co.*, 319 U.S. 315, 317[1943]. The Iowa Code does not purport to authorize such an appeal, Congress has provided none by statute, and the Federal Rules of Civil Procedure...make no such provision.

Id.

Stude's holding that a district court is not empowered to review appeals by dissatisfied parties from local agency decisions using diversity of citizenship as a jurisdictional peg was followed up by the Court's decision in *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348(1961). There a state board granted worker's compensation benefits to an employee and the insurance company, dissatisfied by the award, began a diversity action in federal district court in order to obtain review of the board's decision. *Id.* at 349-350. Texas law provided that any dissatisfied party to such an award was entitled to bring a suit in county court for a trial *de novo* on the issue of the award and that such

an action was in fact a lawsuit, *not* an appeal, and was therefore unbound by the record made in the state agency. *Id.* at 349;354-355.

Reasoning that a *de novo* trial is not an appellate proceeding and is wholly without reference to what may have been decided by the state board, the *Horton* majority found *Stude's* holding inapposite and affirmed the court of appeals' ruling that the district court had subject matter jurisdiction of the insurance company's civil action contesting the award. *Id.* at 355.

Emerging from these two decisions is the principle that federal district courts lack subject matter jurisdiction to hear claims of dissatisfied parties from local agency decisions when those claims are bound to the agency record which neither the dissatisfied party nor the court can change through further hearings and proof. In these situations, the federal district court functions no differently than a state appellate tribunal for the local agency, a function unauthorized by Congress. However, when state law gives a party dissatisfied with a local agency decision the right to a *de novo* trial, unbound by the record made in the state agency----and diversity of citizenship under §1332 is otherwise present---the federal district possesses subject matter jurisdiction to decide the case.

Several courts of appeals have consistently employed this principle and ruled in various contexts that federal district courts are without subject matter jurisdiction to review on appeal findings of state agencies, findings which cannot be changed, even when the parties are of diverse citizenship. See, e.g., *Fairfax Co. Redevelopment & Hous. Authy. v. W.M. Schlosser*

Company, 64 F.3d 155, 157-158(4th Cir.1995); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11(2nd Cir.1992); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 42(1st Cir.1972).

The Ninth Circuit court of appeals likewise read *Stude* and *Horton* to mean that when a party seeks removal of a cause from state court to federal court positing diversity of citizenship and seeks to have reviewed on the same immutable record a decision of a state agency, the federal district court lacks subject matter jurisdiction to decide the matter. *Shamrock Motors, Inc. v. Ford Motor Company*, 120 F.3d 196, 199-200(9th Cir.1997). In *Shamrock*, Montana's Department of Justice Motor Vehicle Division ruled that a dealership had breached its franchise agreement with Ford; the dealership sought review in a Montana district court pursuant to state law. *Id.* at 197. Ford removed this state action to the federal district court on the basis of diversity of citizenship and sought to have the district court review the decision. *Id.* at 198.

Under the same state administrative regime which applies to this petition, review of the state agency's decision is not *de novo* but rather in the nature of appellate review confined to the record before the state agency. *Id.* at 198. The reviewing court cannot substitute its judgment regarding the weight of the evidence for that of the state agency and it may reverse only if the agency's determination was clearly erroneous, an error of law, or arbitrary or capricious or characterized by an abuse of discretion. *Id.* Even if the court is informed of other evidence not presented to the agency and affecting the outcome, the court cannot hear the new evidence but instead must return the case to

the agency for further findings, if appropriate. *Id.*

The district court in *Shamrock* reversed the agency decision and found for the dealership. *Id.* In ruling that the federal district court lacked subject matter jurisdiction to hear this appeal from a state agency decision, the court of appeals in *Shamrock* relied on *Stude* as well as fundamental notions of federalism and noted that in light of the on-the-record, deferential review which the district court had to employ pursuant to the limitations imposed by Montana law, it was fulfilling no more than an appellate role, a function inconsistent with a "civil action" within its original jurisdiction. *Id.* at 199.

In support of its conclusion, the *Shamrock* court noted that

> [a]ppellate administrative review is very little like a civil action in the usual sense. Furthermore, the prospect of a federal court sitting as an appellate court over state administrative proceedings is rather jarring and should not be quickly embraced as a matter of policy....[[E]ven when Congress has done so for important reasons of federalism, the unique problems thereby created and the unique procedures we have had to devise to deal with those problems militate against considering those to be civil actions in the usual sense.

Id. at 200.

With the law in this posture, this Court decided *City of Chicago v. International College of Surgeons*,

522 U.S.156(1997). After a skirmish between the City of Chicago and a landowner over landmark protection of its buildings, the state agency issued a decision in the City's favor and the landowner filed an action in state court pursuant to Illinois administrative review law, seeking on-the-record administrative review of the agency decision and alleging *inter alia* federal claims of a denial of due process, denial of the equal protection of the laws and an unconstitutional taking. *Id.* at 159-160. The City removed the action to the federal district court on the basis of federal question jurisdiction under §1331, *not diversity jurisdiction under §1332. Id.* at 161.

On a record where the landowner was raising federal claims invoking the district court's original federal jurisdiction under §1331 while at the same time seeking on-the-record review of a state agency's decision denying it permits, a majority of the Court held that the federal district court could exercise supplemental jurisdiction over these state claims calling for deferential, on-the-record review of the agency's findings *as long as the district court already possesses original jurisdiction over another claim. Id.* at 165. The majority seemed to diminish in its calculus any importance to whether the administrative review the landowner sought was *de novo* or on-the-record; and it suggested that both *Stude* and *Hortont* "indicate that federal jurisdiction generally encompasses judicial review of state administrative decisions." *Id.* at. 166-167.

This expansive language by the majority and its treatment of *Stude* and *Horton* led Justice Ginsburg to conclude in her dissent, joined by Justice Stevens, that the distinction between *de novo* and on-the-record

review no longer had meaning in determining federal jurisdiction in this context and that district courts must now entertain cross-system, on-the-record appeals from local agency decisions whenever the parties meet the diversity of citizenship requirement of §1332. *Id.* at 175-187. As she saw it, this would result in federal superintendence over a range of local issues having no connection to any national interest, absent express authority by Congress, eroding state judicial and administrative governance, unnecessarily federalizing conduct once thought to be subject only to state regulation, even divorce, alimony and child support, as long as the parties are of diverse citizenship. *Id.* at 186-187.

In response to the dissent's concerns about this unwise expansion of jurisdiction, the majority insisted that it was only deciding that where federal question jurisdiction of the district court is *already* established, state law claims for on-the-record review of a local agency decision fall within the district courts' supplemental jurisdiction under §1367(a). *Id.* at 171-172. As the majority wrote, its ruling

> does *not* answer the question, *nor do we*, whether these same claims, if brought alone, would substantiate the district courts' "original" jurisdiction over diversity cases under §1332. Ultimately, the dissent never addresses this case as it is presented: a case containing federal questions within the meaning of §1331 and supplemental state law claims within the meaning of §1367(a).

Id. at 172(emphasis supplied).

This important question of whether the district courts' diversity jurisdiction alone empowers it to provide appellate review of local agency decisions---- left unanswered by the majority in *City of Chicago*----is presented by this petition. The lower court concluded that *City of Chicago* has diluted *Stude*, *Horton* and its own prior decision in *Shamrock* of much of their collective force and that henceforth federal district courts must entertain cross-system, deferential, on-the-record appeals from local agency decisions without regard to the presence or absence of any federal question whenever the parties meet the diversity of citizenship requirements of § 1332.

Petitioner submits that this reading of *City of Chicago* by the lower court is wrong and that the logic and force of *Stude*, *Horton* and *Shamrock* survive *City of Chicago*. BNSF's attempt to invoke only diversity jurisdiction to have the district court review its cross-system, on-the-record appeal from a Montana state agency should therefore be rejected for the reason that the district court lacks subject matter jurisdiction to do so. After *Stude*, *Horton* and *City of Chicago* and absent a federal question, federal district courts lack subject matter jurisdiction to entertain cross-system, deferential, on-the-record appeals from local agency decisions even if the parties are of diverse citizenship under § 1332 and the Court should take this opportunity to restate this exceptionally important principle of federalism.

Stude, *Horton* and *Shamrock*----as well as *City of Chicago*---- were driven principally by the legitimate concern that federal district courts not become administrative appellate tribunals superintending all

manner of actions by county and municipal agencies, boards and commissions, "a rather jarring [prospect which] should not be quickly embraced as a matter of policy." *Shamrock*,120 F.3d at 200. In fact, *Shamrock* rested less on the distinction between on-the-record and *de novo* review and more on this compelling principle of federalism, i.e., not foisting upon already overburdened federal courts the duty to oversee myriad decisions by state and local authorities from contractors' licenses to building permits, matters properly within the ken of the various States. Public policy, concerns for comity and the idea of a pragmatic federalism are not served by usurping a State court's power to enforce the decisions of its own local administrative agencies.

Moreover, *City of Chicago* is a reaffirmation by the Court of these sound principles of federalism which fueled the result in both *Stude* and *Shamrock*. One circuit court of appeals has reached the same conclusion, narrowly reading *City of Chicago* to its precise facts, i.e., that district courts can exercise supplemental jurisdiction over state claims that call for deferential, on-the-record review of state administrative findings as long as the district court *already* possesses original jurisdiction over another claim. *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 387 n.6(4th Cir. 2000). Petitioner submits that this reading of *City of Chicago* more closely reflects not only the facts of that case but also the sound notions of federalism which underlie its reasoning.

Besides conflicting with the decisions of this Court (*Stude*, *Horton* and *City of Chicago*), the decision below by the Ninth Circuit is at odds with this Fourth

Circuit's reading of *City of Chicago* in *Kirkpatrick* and, to this extent, presents a conflict between these two circuit courts of appeals which itself warrants resolution by the Court.

2. A Removed Action From State Court Based Only On Diversity of Citizenship And Seeking On-The-Record Review of A State Administrative Decision Presents Neither A "Civil Action" For Relief Under Federal Law Nor A "Case or Controversy" Within Article III.

Under Montana's administrative regime, review of the state agency's decision is not *de novo* but rather in the nature of deferential appellate review confined to the record before the state agency. Mont. Code Ann. § 2-4-704(1). The reviewing court cannot substitute its judgment regarding the weight of the evidence for that of the state agency and it may only reverse if the agency's determination was clearly erroneous, an error of law, or arbitrary or capricious or characterized by an abuse of discretion. *Id.*, § 2-4-704(2). Even if the court is informed of other evidence not presented to the agency and affecting the outcome, the court cannot hear the new evidence but instead must return the case to the agency for further findings, if appropriate. *Id.*, § 2-4-703.

The "judicial review" available to parties aggrieved by the decision of the state's Human Rights Commission under Montana Code Ann. § 2-4-702(a) begins with a "petition for review" of that decision in the state district court sitting in the county where the discriminatory conduct occurred. Mont. Code Ann.§ 49-2-508. Thus petitioner filed his petition for review of the

agency's decision in the State of Montana's First Judicial District of Lewis and Clark County, the proper venue for review of the decision by the Human Rights Commission, seeking review of the damage award as well as an award of his attorney's fees.

BNSF, however, filed a so-called "complaint" in the federal district court for the District of Montana, Billings Division, seeking review of the agency's decision against it; and one day later, it filed a "petition for review" in the Montana Thirteenth Judicial District of Yellowstone County, seeking review of the agency's final order, later removing this State court action to the federal district court for the District of Montana, Billings Division.

However, as the Court in *Stude* made clear, 346 U.S. at 580-581, and as reaffirmed by *Shamrock*, 120 F.3d at 199, BNSF's "civil action" filed in federal district court was not a civil action at all for purposes of §§ 1331,1332, 1441(a) or 1367(a). Like the railway's complaint in *Stude* and Ford's removal action in *Shamrock*, BNSF's federal action was a thinly disguised "petition for review" seeking only an appellate-like review by the district court of the propriety of the decision of the state agency. As the *Shamrock* court concluded, in such circumstances the "district court would not be performing a function that could be described as a 'civil action' within its original jurisdiction and, accordingly, the requirements of [§§ 1331,1332, 1441(a) or 1367(a)] would not be fulfilled." 120 F.3d at 199 quoting *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 990(7th Cir. 1996), *rev'd on other grounds, City of Chicago, supra.* See *Trapp v.Goetz*, 373 F.2d 380, 383(10th Cir.

1966)("An appeal from a state administrative board is not a "civil action" as required by 28 U.S.C. §§ 1331 or 1332.").

The requirement of a "civil action" springs from the district courts' limited jurisdiction and the jurisdictional statutes are closely construed. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541(1986). "It is well settled that...jurisdiction of a [district court] of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and the laws of the United States." *Hanford v. Davies*, 163 U.S. 273, 279(1896). It is an Article III inferior federal court, created by Congress in 1891, and possesses only such power as is conferred by statute. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 371-372(1978). *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 701-702(1982).

A corollary principle is that the affirmation by an Act of Congress of jurisdiction in the district courts implies the negation of all such jurisdiction not so affirmed. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513(1868). It is "almost a necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it." *Id. The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252(1867). In fact, there is a presumption that a federal court lacks jurisdiction to decide a matter until it has been affirmatively demonstrated that jurisdiction over the subject matter exists through some statutory grant of power. *Hornthall v. The Collector*, 76 U.S. (9 Wall.) 560(1869).

Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 9-10(1799).

Without jurisdiction and in the absence of a "civil action," the district court cannot proceed in any cause; jurisdiction is power to declare the law and when it ceases to exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) at 250. Every district court therefore has the duty *sua sponte* to reaffirm the statutory grant which gives it the jurisdiction or power to dispose of the controversy before it so that it "shall [not] use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power." *M.C. & L.M. Railway Co. v. Swan*, 111 U.S. 379, 384(1884). *The Dred Scott Case*, 60 U.S. (19 How.) 393, 567(1856)(Curtis, J., dissenting). BNSF's "petition for review" filed in the district court does not amount to a "civil action" and accordingly does not invoke the district court's limited subject matter jurisdiction.

Nor does it qualify as a "case or controversy" within the meaning of Article III, Section 2 of the constitution. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180(2000). "Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *Allen v. Wright*, 468 U.S. 737, 750(1984). *Warth v. Seldin*, 422 U.S. 490, 498(1975).

No principle is more fundamental to the judiciary's proper role in this system of government than the constitutional limitation to actual cases and controversies. *Raines v. Byrd*, 521 U.S. 811, 818(1997) and quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37(1976). Article III enforces this constitutional limitation on the federal judiciary. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1,11(2004). Because BNSF's "petition for review" asks the federal district court to do no more than perform appellate review of a local agency decision, a function which Congress has *not* enumerated in the various statutes setting forth the jurisdiction of the district courts, BNSF's request cannot amount to a "case or controversy" within Article III.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and, ultimately, to reinstate the judgment of dismissal in the District Court or to remand the matter to the District Court for the dismissal of respondent's removed action or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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No. 08-35075
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BNSF RAILWAY COMPANY, a Delaware corporation,
Plaintiff-Appellant,
v.
MATT O'DEA,
Defendant-Appellee.

June 1, 2009, Argued and Submitted, Portland, Oregon
July 16, 2009, Filed

Appeal from the United States District Court for the District of Montana. D. C. No. CV-07-00137-CSO. Carolyn S. Ostby, Magistrate Judge, Presiding.

COUNSEL: Bryan P. Neal and Stephen F. Fink, Thompson & Knight L.L.P., Dallas, Texas, for the plaintiff-appellant.

Terry N. Trieweiler, Trieweiler Law, Whitefish, Montana, for the defendant-appellee.

Before: Diarmuid F. O'Scannlain, Ferdinand F. Fernandez, and Raymond C. Fisher, Circuit Judges. Opinion by Judge Fernandez; Concurrence by Judge Fisher.

OPINION

FERNANDEZ, Circuit Judge:

BNSF Railway Company appeals the district court's dismissal of its action against Matt O'Dea. The district court held that it did not have jurisdiction because the action, in effect, sought appellate review of a decision of the Montana Human Rights Commission. We determine that the district court did have jurisdiction; we reverse and remand.

BACKGROUND

BNSF is a Delaware corporation, and has its principal place of business in Texas. O'Dea is a citizen of Montana.

O'Dea applied to and was extended a conditional offer of employment by BNSF for the position of Conductor Trainee. Based upon an individualized medical assessment, however, BNSF disqualified O'Dea from further consideration for the position. O'Dea then filed a complaint for discrimination with the Montana Department of Labor and Industry, Employment Relations Division, alleging that BNSF had discriminated against him because of the perceived disability of obesity in violation of the Montana Human Rights Act, the Americans with Disabilities Act of 1990, and Title VII of the Civil Rights Act of 1964. A hearing examiner granted O'Dea's motion for a summary ruling on liability and issued a final decision awarding him damages and other relief. The Montana Human Rights Commission affirmed that decision.

The Montana Administrative Procedure Act[1] Provides for judicial review of agency decisions, and BNSF sought review by filing this action based upon diversity jurisdiction. *See* 28 U.S.C. § 1332. O'Dea filed a motion

to dismiss the action and argued that the federal courts lack subject matter jurisdiction because federal courts do not have diversity jurisdiction over appeals from state agencies, and that is what this action amounts to[2] The district court agreed, and dismissed the action. This appeal followed.

STANDARD OF REVIEW

We review the district court's dismissal of this case for lack of subject matter jurisdiction de novo. *See Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 958 (9th Cir. 2006).

JURISDICTION

This appeal wholly turns on questions of jurisdiction. The primary question is whether a district court can entertain a diversity action to review a decision of a state administrative agency where that review is of an on-the-record, rather than de novo, nature. In a case virtually on all fours with the case at hand, we held that federal courts do not have jurisdiction to review decisions of Montana administrative agencies under those circumstances. *See Shamrock Motors, Inc. v. Ford Motor Co.*, 120 F.3d 196, 197-200 (9th Cir. 1997).

O'Dea argues that we are bound by *Shamrock* and must, therefore, affirm the district court. Were his premise correct, we would have to agree. Alas, as we will hereafter explain, it is not. But first we must make a brief detour to answer O'Dea's claim that we do not have appellate jurisdiction in any event.

A. *Appellate Jurisdiction*

We do have jurisdiction to determine whether we have jurisdiction over this appeal. *See Aguon-Schulte v. Guam Election Comm'n*, 469 F.3d 1236, 1239 (9th Cir. 2006).

When BNSF filed this action in the district court, it also, out of an abundance of caution, filed a parallel action in a Montana state court, in which it sought review of the Human Rights Commission decision. It then removed that action to the district court. The district court remanded that action to the state courts for essentially the same reason as it dismissed this action. We, of course, do not have jurisdiction to review that remand. *See* 28 U.S.C. § 1447(c), (d); *Aguon-Schulte*, 469 F.3d at 1240.

O'Dea argues that this appeal is really an appeal from a remand order. Clearly, it is not; it is an appeal from the dismissal of an original action filed in the district court. While we agree with O'Dea that courts should be more concerned with substance than with labels,[3] the fact that this was an original federal court action is no mere label; it is a concrete fact. Thus, the strictures of 28 U.S.C. § 1447 do not apply to it.

But, says O'Dea, BNSF could not file an original action in the district court because the appeal procedure set forth in Montana law declares that a petition for review "must be filed in the [state] district court for the county where the petitioner resides or has the petitioner's principal place of business or where the agency maintains its principal office." Mont. Code Ann. § 2-4-702(2)(a). That means, says he, that original federal

jurisdiction is precluded.[4] We disagree. A state cannot confer rights upon private parties and require that litigation between those parties must be confined to the courts of the state itself. As our hyaline alembic regarding this part of the law put it more than twenty-five years ago, when we were faced with an assertion that state statutes precluded federal court jurisdiction:

> In determining jurisdiction, district courts of the United States must look to the sources of their power, Article III of the United States Constitution and Congressional statutory grants of jurisdiction, not to the acts of state legislatures. However extensive their power to create and define substantive rights, the states have no power directly to enlarge or contract federal jurisdiction.

Duchek v. Jacobi, 646 F.2d 415, 419 (9th Cir. 1981); *see also Marshall v. Marshall*, 547 U.S. 293, 312-14, 126 S. Ct. 1735, 1749-50, 164 L. Ed. 2d 480 (2006); *Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286, 20 L. Ed. 571 (1871); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982).

We recognize, of course, that in *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 581, 74 S. Ct. 290, 295, 98 L. Ed. 317 (1954), the Supreme Court found a lack of jurisdiction. The railroad attempted to file an appeal in the district court from a state administrative ruling in a condemnation case before the condemnation proceedings were complete. *Id.* at 575-77, 74 S. Ct. at 292-93. State law did provide for an appeal to a state court, and the Supreme Court determined that the federal district court should not be a part of that purely

state procedure. As it said, state legislatures cannot "'make a federal district court, a court of original jurisdiction, into an appellate tribunal.'" *Id.* at 581, 74 S. Ct. at 295. We quoted that very passage in *Shamrock*, 120 F.3d at 198, as an important step to our conclusion that diversity jurisdiction was not proper. However, the Court has now indicated that *Stude* was actually referring to a state procedure that was merely an interlocutory step in a condemnation action[5] and has gone on to observe that, in principle, on-the-record review of administrative actions by a district court is perfectly proper.[6] That, and the cases just cited, leave the residual conclusion that state legislatures cannot directly affect federal court jurisdiction. The authorities stand for no more and no less than that.

Nor do we scry anything in the Montana statute itself that would lead us to the belief that the state even contemplated, intended, or attempted to affect federal jurisdiction. We conclude that it did not and could not have succeeded if it had.

B. *Diversity Jurisdiction*

We come, then, to the principal question raised by the parties: Is there federal diversity jurisdiction?

As we have already noted, here, as in *Shamrock*, we deal with the strictures on review of the decisions of Montana administrative agency adjudications. Under Montana law "[t]he review must be conducted by the court without a jury and must be confined to the record." Mont. Code Ann. § 2-4-704(1). Moreover, "[t]he court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of

fact,"[7] and even if the court believes that additional evidence is needed, it cannot take that evidence itself, but must remand to the agency for that purpose.[8]

In light of those provisions and our reading of the paths of the law blazed by the United States Supreme Court, we determined in *Shamrock* that the review in question was of an appellate nature, and "[w]hen a state provides for administrative agency review of an appellate nature, rather than administrative review of a de novo nature, federal district courts have neither original jurisdiction nor removal jurisdiction over the review proceedings." *Shamrock*, 120 F.3d at 200. In so doing, we relied on *Stude*. As we understood that case, the Supreme Court had determined that a state legislature could not turn a district court into an appellate tribunal for state administrative or judicial actions, but had the case been otherwise proper for removal, the district court could have taken jurisdiction because review was de novo. *Shamrock*, 120 F.3d at 198-99. We then went on to consider *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961), and read that case to hold that review of the administrative agency determination was proper because, and only because, "the action required a trial de novo, rather than a true appellate review." *Shamrock*, 120 F.3d at 199. We thought that was why the Court had held that "the district court did have diversity jurisdiction." *Id.* We then referred to the fact that many other courts of appeals had taken the same view, and quoted, with approval, a Seventh Circuit Court of Appeals case[9] which drew that distinction. *Shamrock*, 120 F.3d at 199.

All of that led to our holding, but the Supreme Court has now made it pellucid that we were just plain wrong.

In *City of Chicago*, 522 U.S. at 169-72, 118 S. Ct. at 532-533, the Court reversed the Seventh Circuit Court of Appeals decision that we dubbed trenchant, and thoroughly dismantled its (and our) reading of *Stude* and *Horton*. Moreover, in its discussion, the Court made it plain that there is nothing special about on-the-record review; rather, it said, "[a]fter all, district courts routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *Id.* at 171, 118 S. Ct. at 533. It then noted that "[n]othing in § 1367(a) suggests that district courts are without supplemental jurisdiction over claims seeking precisely the same brand of review of local administrative determinations." *Id.* As we see it, that left little or nothing to prop up *Shamrock's* holding.

We do recognize that, like the case at hand, our prior case was a diversity case,[10] and the Supreme Court made it clear that it was dealing with federal question supplemental jurisdic tion[11] In fact, the Court stated that it was deciding a supplemental jurisdiction case under § 1367(a), and that "does not answer the question, nor do we, whether those same claims, if brought alone, would substantiate the district courts' 'original' jurisdiction over diversity cases under § 1332." *City of Chicago*, 522 U.S. at 172, 118 S. Ct. at 533.

While we cannot fault the Court for limiting itself to the very case it had at hand, the fact remains that it is difficult to see a principled distinction between federal question jurisdiction under 28 U.S.C. § 1331, which is limited to "civil actions," and diversity jurisdiction under 28 U.S.C. § 1332, which has the self-same limitation.[12] In other words, once it is determined that

district courts have full authority to consider on-the-record administrative review to be a "civil action" as such, there is no apparent basis to hold, as did *Shamrock*, that there is no district court diversity jurisdiction over that kind of civil action.[13]

Justice Ginsburg saw the above clearly. She saw that under the Court's reasoning, *Shamrock* must fall[14] because, as she succinctly put it:

> If, as the Court reasons today, the distinction between *de novo* and deferential review is inconsequential, then the district court may, indeed must, entertain cross-system, on-the-record appeals from local agency decisions--without regard to the presence or absence of any federal question--whenever the parties meet the diversity-of-citizenship requirement of § 1332.

City of Chicago, 522 U.S. at 182, 118 S. Ct. at 538 (Ginsburg, J., dissenting).

Therefore, although the Supreme Court did not decide the identical issue in *Shamrock*, or expressly overrule that case, its decision in *City of Chicago* so thoroughly undermined the basis of our decision that we are constrained to say we are "bound by the intervening higher authority" of that Court and must "reject the prior opinion of this court [(*Shamrock*)] as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1095-96 (9th Cir. 2008). The ineluctable result is that even though this case involves on-the-record review of a

Montana administrative agency decision, the district court has diversity jurisdiction.[15]

CONCLUSION

In *City of Chicago*, 522 U.S. at 163, 118 S. Ct. at 528-29, the Supreme Court so severely undermined the rampart we erected between district court diversity jurisdiction and the onslaught of actions seeking on-the-record review of state administrative agency decisions that the structure's collapse was inevitable. That collapse has come. We are, therefore, constrained to hold that *Shamrock*, 120 F.3d at 200, is no longer the law and that the district court does have subject matter jurisdiction to hear BNSF's review action.

REVERSED and REMANDED.

Footnotes

1Mont. Code Ann. §§ 2-4-701 through 2-4-711.

2O'Dea also argued that BNSF failed to join indispensable parties, that venue was improper and that service of process was insufficient. The district court did not rule on those assertions. Nor shall we.

3*See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000).

4O'Dea suggests that BNSF cannot even contest his claim because in another case it (unsuccessfully) judicially admitted that a filing must first be made in the state court. However, assuming that BNSF made that admission, we are unaware of any rule that would

deprive us of jurisdiction in this case because of it. *See, e.g., Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 329 (5th Cir. 2001) (holding that judicial admissions in an action do not extend to other actions); *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 932 n.71 (9th Cir. 1975) (same), *disapproved on other ground by California v. Am. Stores Co.*, 495 U.S. 271, 277-78, 110 S. Ct. 1853, 1857, 109 L. Ed. 2d 240 (1990); *cf. Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001) (stating that failure to gain an advantage in prior litigation cuts against a finding of judicial estoppel).

5*City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 169-70, 118 S. Ct. 523, 532, 139 L. Ed. 2d 525 (1997).

6*Id.* at 170-71, 118 S. Ct. at 532-33.

7Mont. Code Ann. § 2-4-704(2).

8Mont. Code Ann. § 2-4-703.

9*Int'l Coll. of Surgeons v. City of Chicago*, 91 F.3d 981, 990 (7th Cir. 1996), *rev'd*, 522 U.S. 156, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997).

10*Shamrock*, 120 F.3d at 197.

11*City of Chicago*, 522 U.S. at 172, 118 S. Ct. at 533.

12As the Court has told us: "It is implausible, however, to say that the identical phrase means one thing ... in § 1331 and something else . . . in § 1332." *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 561, 125 S. Ct. 2611, 2622, 162 L. Ed. 2d 502 (2005).13

In fact, in *Stude*, 346 U.S. at 578-79, 74 S. Ct. at 294, the Court recognized that, at least after filing, an appeal became a civil action.

14*City of Chicago*, 522 U.S. at 178-79, 118 S. Ct. at 536 (Ginsburg, J., dissenting).

15We, like the Supreme Court, note the possibility that on remand an abstention principle might be applied by the district court, *see City of Chicago*, 522 U.S. at 174, 118 S. Ct. at 534; *see also id.* at 188-89, 118 S. Ct. at 541 (Ginsburg, J., dissenting).

CONCUR BY: Raymond C. Fisher

CONCUR

FISHER, J., Circuit Judge, concurring:

Today we hold that district courts have diversity jurisdiction over appeals from state administrative agency decisions when state law places such appeals in state trial courts and, of course, when the familiar citizenship and amount in controversy requirements are fulfilled. Our holding will necessarily require federal courts of original jurisdiction to sit in an appellate capacity to deferentially review state administrative action. These cross-system appeals have been foreclosed from district court dockets for nearly 12 years under *Shamrock Motors, Inc. v. Ford Motor Co.*, 120 F.3d 196 (9th Cir. 1997), in part because we thought cross-system appeals were bad policy on the basis of well settled principles of federalism. *See id.* at 200. Although it is a close call, I join my colleagues, both of whom participated in deciding *Shamrock*, in holding

that *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997), "effectively overruled" *Shamrock*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). It is a close call both because the *City of Chicago* majority explicitly stated that it was not deciding the question we decide today and because *City of Chicago*'s, reading of the jurisdictional statutes did nothing to undermine the principles of federalism Judge Fernandez articulated in *Shamrock*. If anything, *City of Chicago* reinforced those policy concerns. I am therefore not convinced, as my colleagues are, that *Shamrock* was "just plain wrong," Op. at 9119. I write separately to explain why.

In *Shamrock*, we joined the majority of circuits in holding that district courts lack original jurisdiction over cross-system, on-the-record appeals from state agency decisions because such appeals are not "civil actions" under the diversity and removal jurisdiction statutes. *See Shamrock*, 120 F.3d at 199. We read the civil action requirement to exclude on-the-record review, but not de novo review, because we thought it clear that the states were forbidden from converting federal district courts into administrative appellate tribunals. *See Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 581, 74 S. Ct. 290, 98 L. Ed. 317 (1954). O'Dea has made a colorable argument that *Shamrock's* holding with respect to *diversity jurisdiction* survives *City of Chicago*, because there the Supreme Court explicitly and repeatedly limited its holding to the *supplemental jurisdiction* scenario presented in that case.[1] In fact, the Court denied that original jurisdiction over cross-system appeals was even relevant to supplemental jurisdiction:

> Because this is a federal question case, the relevant inquiry is not, as [respondent] submits, whether its state claims for on-the-record review of the Commission's decisions are "civil actions" within the "original jurisdiction" of a district court: The District Court's original jurisdiction derives from [respondent]'s federal claims, not its state law claims.

City of Chicago, 522 U.S. at 166. Thus, the Court declined to answer the question "whether those same [state] claims, if brought alone, would substantiate the district court's 'original' jurisdiction over diversity cases under § 1332." *Id.* at 172. *Shamrock* had answered that exact question with a firm "no," and we cannot lightly ignore it as binding authority. Yet, as today's opinion explains, *Shamrock* primarily depended on a reading of *Stude*, 346 U.S. at 581, and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 354-55, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961), that the Supreme Court disavowed in *City of Chicago*. After *City of Chicago*, we cannot hold that the standard of review dictated by state law in a cross-system appeal determines whether that cross-system appeal is a "civil action" under the diversity jurisdiction statute. *See Miller*, 335 F.3d at 900 ("[I]ssues decided by the higher court need not be identical in order to be controlling.").

This case is a close one, however, because *Shamrock* did not rest exclusively on the distinction between de novo and on-the-record review that *City of Chicago* rejected. Judge Fernandez's *Shamrock* opinion also articulated a compelling policy reason to read the diversity jurisdiction statute to exclude cross-system appeals. "[T]he prospect of a federal court sitting as an

appellate court over state administrative proceedings is rather jarring and should not be quickly embraced as a matter of policy." *Shamrock*, 120 F.3d at 200. This sound statement of a principle of federalism is no less true after *City of Chicago*; as explained below, I believe the *City of Chicago* majority, in its response to the dissent, actually reaffirmed the policy argument driving *Shamrock*.

Justice Ginsburg, joined by Justice Stevens, dissented from the Court's opinion in *City of Chicago* in part because of her concern that the Court was precipitously reallocating power from state courts to federal courts, without much indication from Congress that it intended such an expansion of federal power. *See City of Chicago*, 522 U.S. at 177 (Ginsburg, J., dissenting). Absent a clear congressional statement, the dissent thought it unwise for federalism reasons to open district courts to "appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." *Id.* at 175 (Ginsburg, J., dissenting). Like *Shamrock*, the *City of Chicago* dissent feared that district courts would be required to encroach on state court prerogative by "directly superintend[ing] local agencies." *Id.* (Ginsburg, J., dissenting). In response, the majority implicitly validated the dissent's protests in two ways, thus reaffirming *Shamrock's* policy argument. First, the majority reiterated the narrowness of its supplemental jurisdiction holding, distancing itself from "the dissent's repeated assumption that the jurisdictional analysis of diversity cases would be no different." *Id.* at 172 (citations omitted). This suggests that lower courts might properly find that diversity cases are different. There are good reasons that diversity cases *should* be

different, the most obvious of which is the expansion of federal court authority foretold by the *City of Chicago* dissent.[2] Second, the majority encouraged district courts to consider the Court's abstention doctrines when presented with a problematic cross-system appeal. The majority therefore must have agreed that cross-system appeals would at times invite an inappropriate exercise of federal jurisdiction. Otherwise the Court would have had no reason to "note that there may be situations in which a district court should abstain from reviewing local administrative determinations even if the jurisdictional prerequisites are otherwise satisfied." *Id.* at 174. In sum, the majority never suggested the dissent's federalism concerns were misplaced, only that they were significantly mitigated by the majority's narrow holding and the applicability of abstention to future cross-system appeals. Accordingly, were it not for the Court's clarification of *Stude* and *Horton*, we would have good reason to follow the rule of *Shamrock* for diversity cases until the Supreme Court tells us otherwise.

We can only speculate whether today's holding will result in a deluge of cross-system appeals, or whether BNSF is correct that such concerns are overblown. Given these concerns, however, I join my colleagues in urging the district court to decide in the first instance whether any abstention doctrine applies. I am also mindful of the two parallel state court actions these same parties are currently litigating. If these state court proceedings conclude on the merits before the district court decides this case, ordinary principles of res judicata might dictate whether the district court can or should decide this cross-system appeal. Careful consideration of these and perhaps other limitations on

federal jurisdiction might help the district court proceed with caution, lest it "jeopardize the 'strong interest' courts of the State have in controlling the actions of local as well as state agencies." *City of Chicago*, 522 U.S. at 185 (Ginsburg, J., dissenting).

Footnotes

1The Fourth Circuit has adopted a narrow reading of *City of Chicago* like the narrow reading O'Dea urges here. *See Kirkpatrick v. Lenoir County Bd. of Educ*, 216 F.3d 380, 387 n.6 (4th Cir. 2000) (noting that *City of Chicago* affirmed only "supplemental jurisdiction over state claims that call for deferential on-the-record review of state administrative findings when the district court already possesses original jurisdiction over another claim").

2Further, the diversity statute, unlike the supplemental jurisdiction statute, does not afford district courts the discretion to decline jurisdiction over state law claims. *Compare* 28 U.S.C. § 1332 *with* 28 U.S.C. § 1367(c). District courts sitting in diversity therefore lack the option of refusing state law claims out of consideration for "judicial economy, convenience, fairness, and comity." *City of Chicago*, 522 U.S. at 173 (quotation marks omitted).

Filed 01/04/08

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV-07-137-BLG-CSO

BNSF RAILWAY COMPANY, a Delaware corporation,
Plaintiff,
vs.
MATT O'DEA, Defendant.

CV-07-141-BLG-CSO

MATT O'DEA,
Plaintiff,

vs.

BNSF RAILWAY COMPANY, a Delaware corporation,
Defendant,

ORDER CONSOLIDATING CASES FOR LIMITED PURPOSE AND GRANTING PENDING MOTIONS

BNSF Railway Company ("BNSF") initiated the above actions (referred to hereafter as "07-137" and "07-141") against Matt O'Dea ("O'Dea") to obtain federal court review of a Montana Human Rights Commission ("HRC") order affirming the decision of a hearing examiner for the Montana Department of Labor and Industry. The hearing examiner ruled that BNSF illegally discriminated against O'Dea when BNSF

withdrew a conditional offer of employment that it had extended to O'Dea.

By Notices of Assignment filed on November 16, 2007, in 07-137 (Court's Doc. No. 13) and in 07-141 (Courts Doc. No. 7), upon the parties' consent, the cases were assigned to the undersigned for all purposes. Before the Court in 07-137 is O'Dea's Motion to Dismiss (Courts Doc. No. 9). Before the Court in 07-141 is O'Dea's Motion to Remand or in the Alternative to Change Venue (Court's Doc. No. 4). Having considered the parties' arguments in support of their respective positions, the Court deems it appropriate to consolidate the cases and to grant the motions for the reasons stated herein.

I. BACKGROUND[1]

On September 1, 2004, O'Dea filed a complaint with the Montana Department of Labor and Industry alleging that BNSF had discriminated against him by refusing to hire him because of obesity, a perceived disability.

On August 11, 2006, a department hearing examiner granted O'Dea's motion for summary ruling with respect to liability. On May 15, 2007, the hearing examiner issued a final decision awarding O'Dea damages and other relief. On September 27, 2007, the HRC affirmed the hearing examiner's decisions.

On October 3, 2007, BNSF filed 07-137 invoking the Court's diversity jurisdiction under 28 U.S.C. § 1332. On October 4, 2007, BNSF filed a Petition for Review of the final agency decision in Montana's Thirteenth Judicial District Court, Yellowstone County. On

October 17, 2007, BNSF, again invoking the Court's diversity jurisdiction, removed that case to this Court where it is pending before the undersigned as 07-141. In both 07-137 and 07-141, BNSF seeks judicial review of 'the HRC's flinal administrative decision. Id. at 1.[2]

On October 18, 2007, O'Dea filed a Petition for Review of the same final agency decision in Montana's First Judicial District Court, Lewis and Clark County. On November 13, 2007, BNSF removed 'that case to this Court, where it is presently pending before Judge Lovell as O'Dea v. BNSF Railway Company, Montana Dept. of Labor and Industry, and Montana Human Rights Commission, CV-07-69-H-CCL.

For its relief in 07-137 and 07-141, BNSF seeks "complete dismissal of [O'Dea's] complaint or, in the alternative, modifications or dismissal of those portions of the order that are clearly erroneous, unsupported by evidence or in excess of the authority of the agency." Id. at 4.[3]

II. DISCUSSION

A. Consolidation of 07-137 and 07-141 for limited purpose

Because of the obvious similarities between 07-137 and 07-141, the Court first considers whether to consolidate the actions for the purpose of addressing pending motions. Rule 42(a), Fed. R. Civ. P., provides:

> Consolidation. If actions before the court involve a common question of law or fact, the court may:

> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a) (2007).
Rule 42's language authorizes district courts to consolidate cases sua sponte. Chambers v. Coonev, 2007 WL 3287364 (S.D. Ala. 2007)(citing Devlin v. Transportation Communications Int'l Union, 175 F.3d 121,130 (2d Cir. 1999) ("A district court can consolidate related cases under [Rule] 42(a) sua sponte."), Blasko v. Washington Metropolitan Area Transit Authority, 243 F.R.D. 13, 15 (D.D.C. 2007) ("By its plain language, Rule 42(a) permits sua sponte consolidation."), and Disher v. Citigroup Global Markets, Inc., 487 F.Supp.2d 1009,1013-14 (S.D. Ill. 2007) ("A court may order consolidation sua sponte and, if need be, over the objections of parties.")).

Consolidation of actions provides "a valuable and important tool of judicial administration ... [that] helps relieve[] the parties and the [c]ourt of the burden of duplicative pleadings and [c]ourt orders." Blasko, 243 F.R.D. at 15 (citations omitted). Generally, consolidation may be appropriate if there are common questions of law or fact.

> To determine whether consolidation is appropriate, a court should consider both equity and judicial economy. If savings of expense and gains of efficiency can be accomplished without sacrifice of justice, a court may find the actions merit consolidation.

> Actions that involve the same parties are apt candidates for consolidation. Moreover, consolidation is particularly appropriate when the actions are likely to involve substantially the same witnesses and arise from the same series of events or facts.... In short, courts weigh considerations of convenience and economy against considerations of confusion and prejudice.

Id. (citations and internal quotations omitted).

Here, as noted, 07-137 and 07-141 involve the same parties - BNSF and O'Dea. Also, both cases arise from the HRC's final administrative decision that BNSF discriminated against O'Dea by refusing to hire him. Both cases involve BNSF's request for judicial review of the HRC's decision. Finally, both cases are in similar procedural postures, and it is not readily apparent that any party would suffer unfair prejudice were the Court to consolidate the actions to address pending motions. Thus, the Court deems consolidation of 07-137 and 07-141 appropriate for purposes of this Order, and hereby consolidates the cases as it addresses pending motions in each.

B. Pending Motions

In 07-137, O'Dea seeks dismissal arguing that the Court lacks subject matter jurisdiction over BNSF's action. O'Dea argues that the action is in the nature of an appeal from a state agency's decision and the Ninth Circuit has determined that federal courts sitting in diversity lack jurisdiction over such actions. 07-137-

O'Dea's Br. At 58. O'Dea also argues that: BNSF failed to join the Montana Department of Labor and Industry, an indispensable party whose joinder would defeat diversity, id. at 9-11; the Court's Billings Division is an improper venue for this case, id. at 11-13; and the case also is subject to dismissal because of insufficiency of process and of service of process, id. at 13-14.

In 07-141, O'Dea seeks remand arguing, as he did in 07-137, that the Court lacks subject matter jurisdiction. 07-141 - O'Dea's Br, at 6-9. Again, O'Dea argues that the action is in the nature of an appeal from a state agency's decision and the Ninth Circuit has determined that federal courts sitting in diversity lack jurisdiction over such actions. Id. O'Dea also argues that: BNSF improperly removed this case to federal court because BNSF is the petitioner that initiated the action in Montana state court, id. at 9-11; Burford abstention and federalism principles counsel the Court against exercising jurisdiction, id. at 11-15, the State of Montana is the real party in interest whose presence herein defeats diversity jurisdiction, id. at 15-17; and the Court's Billings Division is an improper venue for this case, id. at 17-19.

Having considered the parties' arguments, the Court concludes that it lacks subject matter jurisdiction. Thus, the Court will dismiss 07-137, without prejudice, and will remand 07-141. Because of the Court's conclusion that is lacks jurisdiction, it will not address O'Dea's other arguments in support of his motions.

1. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction and

'therefore the "first and fundamental question" is one of jurisdiction. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998). The requirement that jurisdiction be established is a threshold matter and is "inflexible and without exception." Id. (citing Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382- (1884).

The subject matter jurisdictional issue here is whether the rule announced in Shamrock Motors Inc. v. Ford Motor Co., 120 F.3d 196 (9th Cir. 1997), remains effective. In Shamrock, an automobile dealership franchisee sought, in state court, review of a state administrative agency's determination in favor of Ford, the franchisor, with respect to Ford's termination of the parties' franchise agreement. Shamrock, 120 F.3d at 197. Ford removed the case to federal court based on diversity jurisdiction. The federal district court reversed the state agency's decision and rendered judgment in the franchisee's favor. Ford appealed. Id.

The Ninth Circuit noted that Montana state court reviews of state administrative decisions are appellate in nature and are afforded deferential, rather than de novo, review. Where such a case is in federal court based on diversity jurisdiction, the Ninth Circuit held that "federal district courts have neither original jurisdiction nor removal jurisdiction over the review proceedings." Id. at 200. Thus, the Ninth Circuit concluded that the federal district court, in reversing the decision of the state agency, improperly "acted as an appellate tribunal and exceeded its jurisdiction." Id.

In the cases at hand, the review BNSF seeks of the HRC's decision is appellate in nature. Under Montana's

Administrative Procedures Act, judicial review of an agency action "must be conducted by the court without a jury and must be confined to the record." Mont. Code Ann. § 2-4-704(1) (2007). The review is limited, absent a showing of good cause, to issues raised before the agency. Mont. Code Ann. § 2-4702(1)(b) (2007). Also, "[t]he court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Mont. Code Ann. § 2-4704(2) (2007).

As the Ninth Circuit noted in Shamrock, "[t]he Montana administrative review procedure is clearly of an appellate nature: it is about as far from de novo trial review as one could imagine." Shamrock, 120 F.3d at 200. Under the rule stated in Shamrock, because these diversity actions seek what is essentially appellate review of a state administrative agency's decision, the Court lacks subject matter jurisdiction.

BNSF resists O'Dea's motions arguing that the United States Supreme Court's decision in City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), "stripped away the foundation of Shamrock and the other cases holding similarly to it." 07-137 - Pltfs Corrected Response to Defendants Mot. to Dismiss ("BNSF's Resp.") (Court's Doc. No. 17) at 1.[4] BNSF argues that the Supreme Court's reasoning in College of Surgeons eviscerated the basis for the Ninth Circuit's conclusion in Shamrock, i.e., that the "dichotomy" between de novo and appellate review of state administrative agency actions determined federal court subject matter jurisdiction. Id. at 1-3. BNSF argues that the Supreme Court rejected the view that de novo review of a state administrative agency decision was a precondition to federal jurisdiction. Id.

at 3.

In support of its argument, BNSF notes that Justice Ginsburg's dissenting opinion in College of Surgeons supports its reading of the case. Id. at 4-5. It notes that Justice Ginsburg catalogued the circuit court opinions, including Shamrock, that the majority's decision "overr[o]de[]." Id. at 5. BNSF concedes that "the precise holding of [College of Surgeons] does not overrule Shamrock" because the case actually dealt with federal courts' supplemental, not original, jurisdiction. But BNSF argues that "there can be no doubt about the effect of the Court's ruling: [College of Surgeons] overruled Shamrock." Id. at 5.

BNSF also argues that: other subsequent decisions, such as Verizon Maryland Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635, 644 n.3 (2002), have "significantly undercut[] the de novo vs. appellate distinction Shamrock relied on[,]" id. at 5; the Ninth Circuit, in S.J. v. Issaquah Sch. Dist. No. 411,. 470 F.3d 1288, 1292 (9th Cir. 2006), reached a similar conclusion, and in Bilbruck v. BNSF Railway Co., 2007 WL 2168023 (9th Cir. July 30, 2007), noted in dicta that College of Surgeons called Shamrock's rule into doubt, id. at 5-6; in various other situations, federal courts are authorized to review agency decisions, id. at 10; and adopting O'Dea's position on the issue would deny it its constitutional right of access to federal court, id. at 10-11.

Having carefully considered BNSF's arguments, the Court is not persuaded. First, with respect to BNSF's argument that College of Surgeons effectively overruled Shamrock, the Court disagrees. As BNSF

concedes, College of Surgeons addressed the issue of whether a lawsuit filed in state court seeking judicial review of non-federal administrative agency action could be removed to federal court where the case contained both federal question claims and state administrative challenges to the agency's decisions. The Court in College of Surgeons permitted removal to federal court of a case containing claims failing within the federal court's supplemental jurisdiction where removal was based on a federal question. The action was not in federal court based on diversity jurisdiction, as are the cases at hand.

Also, it is clear from a fair reading of College of Surgeons that the seven-member majority of the Supreme Court expressly left open the question whether removal would have been proper had the federal court's diversity jurisdiction been invoked. College of Surgeons , 522 U.S. at 172 (declining to answer whether state law claims for on the record review of a local agency's decision, "if brought alone, would substantiate the district courts' 'original' jurisdiction over diversity cases under § 1332"). Thus, BNSF's reliance on Justice Ginsburg's dissenting opinion as demonstrating a change in the rule announced in Shamrock is misplaced.

Second, the Court also is not persuaded by BNSF's arguments that decisions in other cases support its position that Shamrock is no longer good law. Verizon Maryland involved a complaint for declaratory and injunctive relief from an order From Maryland's Public Service Commission. The action was in federal court based on the court's federal question jurisdiction, 535 U.S. at 643, and not on diversity as are the cases at

hand. BNSF's reliance on S.J. v. Issaqiauah Sch. Dist. also is not persuasive. That case involved a student's action against a school district and school officials for alleged violation of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq., a federal statute that permits an aggrieved party to file an action in federal court after a state agency renders a decision. 20 U.S.C. § 1415(1)(2) and (3). The case involved federal question jurisdiction, not diversity.

Also, the Court is unpersuaded by BNSF's citation to Bilbruck v. BNSF Railway Co., 2007 WL 2168023 (9th Cir., July 30, 2007) (unpublished), in support of its argument that Shamrock is no longer good law. In Bilbruck, BNSF removed a case against it to this Court. Judge Haddon remanded the case, and BNSF appealed. The Ninth Circuit determined that the remand order was not appealable and dismissed BNSF"s appeal. In a footnote that BNSF concedes is dicta, BNSF's Resp. at 6, the three judge panel considering the appeal stated: "We note ... that the viability of Shamrock Motors is highly questionable in light of the Supreme Court's decision in [College of Surgeons.]" Bilbruck, n.3 (citing College of Surgeons, 522 U.S. 178-79 (Ginsberg J., dissenting) (listing Shamrock Motors among the cases that College of Surgeons "overrides").

The Court concludes that the panel's dicta in Bilbruck does not erase Shamrock's clear holding. As noted above and acknowledged by BNSF, the panel's statement is dicta appearing in a footnote in an unpublished opinion. It does not carry the force of binding precedent. It has not been suggested, nor could it reasonably be suggested, that this dicta alters

existing Ninth Circuit law.

Also, the dicta relies on a statement from the dissenting opinion from College of Surgeons. The majority opinion in College of Surgeons specifically addressed the dissenting opinion and noted that it misapprehended the scope of the majority's holding in the case. Thus, the Court is not persuaded that Bilbruck renders Shamrock invalid.

Third, with respect to BNSF's argument that federal courts review agency decisions in various other situations, the Court notes that the circumstances of those cases are inapposite to those of the instant cases. Many of the cases upon which BNSF relies involve congressionally conferred federal jurisdiction. See, e.g., 29 U.S.C. § 1132 (providing federal courts with jurisdiction over ERISA claims); 42 U.S.C. § 405(g) (providing for federal judicial review of decisions by the Commissioner of Social Security); 47 U.S.C. § 252(e) (providing federal court review of state utility regulatory commission actions); and 9 U.S.C. §§ 9-11 (providing federal judicial review of arbitration decisions). Here, the Court is unaware of any similar federal statute that gives it jurisdiction over these actions.

Finally, with respect to BNSF's remaining arguments, the Court is mindful that, when "the relevant court of last resort" has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that 'the cases are clearly irreconcilable[,]" it must reject prior circuit authority and follow 'the course set by the subsequent case. Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Here, however, for the

reasons stated above. the Court is not convinced that College of Surgeons or the other decisions that BNSF cites are "clearly irreconcilable" with Shamrock. Despite BNSF's position that granting O'Dea's motions will deny it a constitutional right of access to federal court, Shamrock remains good law and binding precedent upon this Court. The Court declines to rule contrary to existing Ninth Circuit precedent.

III. CONCLUSION

Based on the foregoing, IT IS ORDERED:

(1) Cause numbers CV-07-137-BLG-CSO and CV-07-141-BLG-CSO are hereby consolidated for the purpose of addressing the pending motions in these cases.
(2) O'Dea's Motion to Dismiss (Courts Doc. No. 9) in 07-137 is GRANTED and the case is DISMISSED without prejudice.
(3) O'Dea's Motion to Remand (Courts Doc. No. 4) in 07-141 is GRANTED. This case is REMANDED to the Montana Thirteenth Judicial District Court, Yellowstone
County.
(4) Each party shall bear its own fees and costs.

The Clerk of Court is directed to enter Judgment in 07-137 dismissing the action without prejudice. With respect to 07-141, the Clerk shall send a certified copy of this remand order to the Montana Thirteenth Judicial District Court, Yellowstone County.

Footnotes

1The background of each case is identical and

undisputed. See 07-137 Cmplt. (Court's Doc. No. 1); 07-137 Deft's Br. in Support of Mtn. to Dismiss ("O'Dea's Br.") (Court's Doc. No. 11) at Ex. 1(hearing examiner's Summary Ruling); 07-141 Notice of Removal (Court's Doc. No. 1.) at Ex A (state court Petition for Review); 07-141 Appellee's Br. in Support of Mtn. to Remand or in the Alternative to Change Venue (Court's Doc. No. 5) at Ex 1 (hearing examiner's Summary Ruling).

2In its Complaint in 07-137 and in its Petition for Review originally filed in state court in 07-141, BNSF alleges, inter alia, that a basis for review of the HRC's action is that it violated the Americans with Disabilities Act of 1990. Because BNSF seeks review of a state administrative agency decision, even though a private individual and not an agency is named as defendant, and because BNSF expressly invokes the Court's diversity jurisdiction in each action and does not argue that federal question jurisdiction exists, the Court concludes that federal question jurisdiction is not at issue.

3On December 7, 2007, BNSF filed a "Stipulation Concerning Contentions" in 07-137 (Court's Doc. No. 19) and in 07-141 (Court's Doc. No. 16) in which it concedes that it "does not contend that the prospective relief ordered by the agency is unlawful or exceeds the agency's authority ... [but] BNSF will continue to press its remaining contention ... that no prospective relief is warranted or permitted because the agency's liability finding is unsupported by the evidence and otherwise deficient as stated elsewhere in the complaint [and petition for review]."

4BNSF makes identical arguments to those cited here

in 07-141 - Defts Response to Plaintiff's Motion to Remand (Court's Doc. No. 8).

Filed 8/21/2009

No. 08-35075
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BNSF RAILWAY COMPANY, a Delaware corporation,
Plaintiff-Appellant,
v.
MATT O'DEA,
Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: O'Scannlain, Fernandez, and Fisher, Circuit Judges.

Appellee's petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banac consideration.

The petition for rehearing en banc is DENIED.